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FILED
JAN 20 1994
OFFICE OF THE CLERK

No. 93-973

In The

Supreme Court of the United States

October Term, 1993

MANILDRA MILLING CORPORATION,

Petitioner,

v.

OMI HOLDINGS, INC.,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Federal Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BYRON L. GREGORY
227 W. Monroe St.
Chicago, Illinois 60606
(312) 372-2000
Counsel of Record

Of Counsel:

ROGER W. WENTHE
227 West Monroe St.
Chicago, IL 60606

MARK LEE HOGGE
555 13th St. NW
Washington, DC 20004-1109

PATRICK MCANANY
707 Minnesota Avenue
Kansas City, KS 66117

January 21, 1994

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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LIST OF PARTIES

The list of parties presented by Petitioner Manildra Milling Corporation ("Manildra") is essentially correct in most respects. However, Respondent OMI Holdings, Inc. is not a successor in interest to Ogilvie Mills, Inc., the Defendant in the District Court proceedings. Instead, OMI Holdings, Inc. is the new name of the corporation previously named Ogilvie Mills, Inc.

RULE 29.1 LIST OF PARENT COMPANIES

OMI Holdings, Inc. is a wholly owned subsidiary of a wholly owned subsidiary of John Labatt, Inc. OMI Holdings, Inc. has no subsidiaries.

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SUMMARY OF ARGUMENT

The Petition does not raise a constitutional issue, because the motion for judgment as a matter of law is a well-established procedure which does not inherently interfere with the right to civil jury trial.

The Federal Circuit properly granted OMI's motion for JMOL on the Lanham Act and tort counts, because substantial evidence was not presented to support the elements of those claims which require a showing that OMI knowingly made false accusations that Manildra had infringed OMI's patents. The few isolated portions of the record cited by Manildra cannot support reasonable inferences sufficient to permit a reasonable jury to find in Manildra's favor on those elements.

In addition, Manildra failed the stricter evidentiary standard which could have been applied to its claims. To prevent a collision between the patent laws on the one hand and either the Lanham Act or state law on the other, a patentee's patent-enforcement efforts should create liability under those other laws only if the challenger demonstrates that patent misuse or inequitable conduct occurred by clear and convincing evidence. Manildra failed to meet this stricter standard.

ARGUMENT

I. THERE IS NO SEVENTH AMENDMENT ISSUE.

Manildra accuses the Federal Circuit of failing generally to give appropriate deference to verdicts entered by juries in complex lawsuits and of failing particularly to

defer to the verdict entered in this case. Manildra's complaint appears to be more directed to the very existence of the motion for judgment as a matter of law, rather than to the Federal Circuit's application of that procedure in this case.

Manildra's Petition for Writ of Certiorari (the "Petition") claims, without citation or discussion of authority, that entering judgment as a matter of law denies civil litigants their Seventh Amendment right to trial by jury. The Seventh Amendment states:

> In Suits at common law . . . the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

U.S. CONST. amend. VII.

The Court has repeatedly held that the procedures known at various times as the motion for directed verdict, the motion for JNOV, and now the motion for judgment as a matter of law ("JMOL") are an essential part of "the rules of the common law" which the Seventh Amendment expressly incorporates. *Galloway v. United States*, 319 U.S. 372, 390-96 (1943). The Court has also confirmed, in *Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317, 322 (1967), that a JNOV may constitutionally be entered in the first instance by an appellate court:

> As far as the Seventh Amendment's right to jury trial is concerned, there is no greater restriction on the province of the jury when an appellate court enters judgment *n.o.v.* than when a trial

court does; consequently, there is no constitutional bar to an appellate court granting judgment *n.o.v.*

The JMOL, under its current and previous names, has been used to remove from the jury's consideration any claim on which there is no genuine factual controversy for the jury to address. It protects the right of a defending litigant not to have an unsubstantiated claim presented to the jury, a right worthy of protection equivalent to the right to have a legitimate factual dispute presented to a jury. *Galloway, supra,* held: "The [Seventh] Amendment was not framed or adopted to deprive either party of either right. It is impartial in its guaranty of both. To posit assertion of one upon sacrifice of the other would dilute and distort the full protection intended." 319 U.S. at 393.

Manildra claims that the Federal Circuit has exceeded the bounds of this procedure by engaging in "overly aggressive fact-finding" in this case and others. Manildra's Petition ("Man. Pet.") at 7. The Federal Circuit actually held, however, that there is an *absence* of evidence to support the critical elements of Manildra's Lanham Act and tort-law claims in this case. See Manildra's Appendix ("Man. App.") at 19a. Finding that no relevant facts were proved is very different from finding new facts different from those the jury found.

Manildra's Petition has isolated five items of evidence from which it believes a reasonable jury could have drawn an inference that OMI had knowingly or wrongfully accused Manildra of infringing OMI's patents (the "Patents"). In other words, for those five items, Manildra simply disagrees with the Federal Circuit. Manildra

believes this evidence could support reasonable inferences leading to a favorable conclusion, and the Federal Circuit held that it could not. The Federal Circuit held that Manildra's proffered interpretations of the evidence, rather than being reasonable inferences, were instead hindsight speculation tailored to justify the unfounded jury verdict. This result was well supported by the record and was, therefore, well within the strictures of the Seventh Amendment. As a result, it is unnecessary for the Court to grant certiorari in this matter.

II. THE FEDERAL CIRCUIT PROPERLY REFUSED TO ACCEPT SPECULATION IN THE PLACE OF REASONABLE INFERENCES.

The essential difference between a case which warrants a jury's consideration and one that does not is that a jury is permitted to find facts if inferences could reasonably be drawn from the evidence, but it is not permitted to take the case if inferences could be drawn only by the use of speculation. The Court held in *Galloway, supra*, 319 U.S. at 395:

> It hardly affords help to insist upon "substantial evidence" rather than "some evidence" or "any evidence," or vice versa. The matter is essentially one to be worked out in particular situations and for particular types of cases. Whatever may be the general formulation, the essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked.

Manildra's Petition cites a series of the Court's decisions in cases involving the Federal Employers Liability Act and the Jones Act which overturned lower-court decisions imposing proof requirements for causation that interfered with those statutes' remedial purposes. In each of those cases, however, the Court reaffirmed the principle that a jury verdict based on circumstantial evidence can stand only if that evidence could permit a jury reasonably to reach its conclusion, without conjecture. *Rogers v. Missouri P.R.R. Co.*, 352 U.S. 500, 506-07 (1957) ("Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, *with reason*, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death"); *Schulz v. Pennsylvania R.R. Co.*, 350 U.S. 523, 526 (1956) (jurors' conclusions are to be based on evidence "from which inferences can *fairly* be drawn"); *Tennant v. Peoria & P.U.R. Co.*, 321 U.S. 29, 32-33 (1944) (quoted in *Gallick v. Baltimore & Ohio R.R. Co.*, 372 U.S. 108, 114-15 (1963)) (probative facts must be presented from which negligence and causation "could *reasonably* be inferred") (emphasis added).[1]

The Federal Circuit's ruling, which overturned only a portion of the jury's verdicts, was consistent with *Galloway, supra*, and with these FELA and Jones Act cases because the Federal Circuit refused to permit the jury to

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[1] The Petition misquoted *Gallick*'s quotation of *Tennant*. Man. Pet. at 15. The first four lines quoted appear at the end of the paragraph quoted, not at the beginning, and the first sentence after the asterisks omits the words "on a theory" after the words "from the jury". *See Gallick, supra*, 372 U.S. at 114-15.

speculate on Manildra's severely attenuated evidence on the Lanham Act and tort claims. The Federal Circuit correctly held that this evidence could not support a reasonable inference in Manildra's favor.

A. The Federal Circuit Left Most of the Jury's Findings Intact.

Manildra's Petition attempts to portray the Federal Circuit as inherently hostile to subordinate fact-finders, whether they are judges or juries. The Petition offers a picture of a court that finds facts whenever and wherever it sees the opportunity. It quotes critics of the Federal Circuit who have accused that court of usurping the fact-finder's role as a means of implementing an implicit agenda to find patents valid and noninfringed wherever possible. Man. Pet. at 7-13.

Whatever the validity of that criticism in other cases, it would have predicted the very opposite of the Federal Circuit's outcome in this case. Here, the Federal Circuit upheld the jury's verdicts finding both of OMI's Patents invalid and not infringed. The Federal Circuit specifically refused to interfere with the jury's findings on the patent claims because it found they were supported by substantial evidence. For example, on infringement, the Federal Circuit stated: "Although there is evidence to the contrary, the evidence supporting the jury's verdict on this issue is substantial and, therefore, legally sufficient to prevent our disturbing the jury's finding of fact on this issue." Man. App. at 11a. The Federal Circuit also refused to interfere with the jury's verdict against Manildra on

the antitrust claims, which had alleged conspiracy and monopolization. *Id.* at 21a-22a.

The Federal Circuit overturned only the verdicts on Manildra's "unfair competition" claims under the Lanham Act and the Kansas law of intentional interference with prospective business advantage and injurious falsehood. Its decision states that these verdicts were overturned only because there was no more than a scintilla of relevant evidence to support them:

> Since substantial evidence requires more than a "mere scintilla" of evidence, *Biodex Corp.*, 946 F.2d at 859, 20 USPQ 2d at 1259, we conclude on this record that a reasonable jury could not have found Ogilvie liable to Manildra under the Lanham Act and the state law causes of action because the evidence on the "wrongful" elements of those claims constitutes at most a "mere scintilla."

Man. App. at 19a.

The overall result does not fit with Manildra's image of a court that lacks respect for jury determinations.[2] Instead, the result demonstrates the Federal Circuit's

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[2] Manildra's argument that the Federal Circuit has no regard for the jury's fact-finding is belied by the Federal Circuit's affirmations of the verdicts on infringement and validity. As OMI points out in its Cross-Petition for Writ of Certiorari, the Federal Circuit's affirmation as to non-infringement was flawed since it had determined that there was evidence of infringement, and the affirmation as to invalidity was erroneous since all of the pertinent art had been before the Patent and Trademark Office. Nonetheless, the Federal Circuit's errors had nothing to do with any alleged disregard for the jury's findings.

ability to distinguish between claims that are properly supported and those that are not, and to disturb only those that fail the test.

B. Only the Evidence of OMI's Conduct Was Relevant.

Manildra attempted throughout the trial to persuade the jury to hold OMI liable for the conduct of the prior owner of the Patents, Henkel Corporation ("Henkel"). When Manildra continued these efforts on appeal, the Federal Circuit rejected them. The same efforts have continued in the Petition for Writ of Certiorari, and the Court should also reject them for the same reasons.

Henkel owned the Patents from November 10, 1978 until March 1, 1985. Man. App. at 2a-3a. On March 1, 1985, the operating assets of Henkel's United States wheat starch processing operations, including the Patents, were sold to Ogilvie Mills, Inc. (the Respondent, now named OMI Holdings, Inc.), an unrelated company. *Id*. Some of the people employed by Henkel became OMI employees. OMI did not, however, purchase or become responsible for Henkel's liabilities. Man. App. at 18a n.15.

Manildra filed claims in this lawsuit against both Henkel and OMI. Manildra alleged that Henkel had violated the antitrust laws, Lanham Act, and state tort law during Henkel's ownership of the Patents, and it alleged that OMI had committed separate violations of those laws during OMI's ownership of the Patents. Man. App. at 3a. During discovery, Manildra uncovered a significant volume of evidence indicating that during its ownership of

the Patents, Henkel had made statements to carbonless copy paper manufacturers accusing Manildra of infringing the Patents. Man. App. at 18a n.15. Manildra was unable, however, to find evidence of similar conduct by OMI during OMI's tenure. Just before trial was to begin, Manildra settled its claims against Henkel for an undisclosed amount. Man. App. at 3a n.4.

Manildra then proceeded to trial against OMI. Throughout the trial, Manildra again and again offered into evidence the information it had accumulated showing Henkel's alleged wrongful conduct during its ownership of the Patents. Manildra offered various justifications for the admissibility of this evidence, primarily claiming it was "background" information to the period of OMI's ownership. OMI strenuously objected to this evidence, but the trial court decided to admit the evidence and then instruct the jury in writing to use it only for the antitrust claims. *See* Man. App. at 18a n.15. Instruction 24a stated:

> Evidence of conduct of the Henkel Corporation has been admitted into this case. This evidence has been admitted for the limited purpose of determining whether or not Manildra has proved one or more of the three conditions described in Instruction 24 [relating to the antitrust claims]. You may not consider this evidence for any other purpose.

OMI App. at 6a.

The jury's verdicts found OMI not guilty of patent misuse, inequitable conduct, and antitrust violations, but surprisingly found OMI guilty on Manildra's other "unfair competition" claims under the Lanham Act and

state tort laws. Man. App. at 4a. OMI's motion for judgment as a matter of law on the Lanham Act and tort counts was denied by the district court, and OMI appealed that ruling. *Id.*

Before the Federal Circuit, Manildra attempted to justify the jury's verdicts against OMI on the unfair competition claims by citing evidence showing the activities of Henkel employees during Henkel's tenure as owner of the Patents. The Federal Circuit correctly refused to accept that tactic and instead independently reviewed the record to determine whether Manildra had presented substantial evidence of conduct *by OMI* on which a reasonable jury could have found OMI liable. It found that this evidence was not substantial and was instead at most a mere scintilla.

The Federal Circuit described its time-consuming effort to separate the relevant, admissible evidence of OMI activities from Manildra's smokescreen of Henkel evidence as follows:

> Manildra argues in this overly adversarial portion of the appeal that Ogilvie's patent "litany" constituted a series of misrepresentations to their mutual customers that Manildra was infringing the patents in suit and therefore the customers acted at their own risk in purchasing the infringing product. According to Manildra, this "litany" satisfies the "wrongful" elements and therefore provides a sufficient basis on which to find Ogilvie liable. Manildra's argument is premised on the alleged statements being false as a matter of fact because the jury found Manildra not to be infringing either patent:

> There was abundant evidence in the record that Ogilvie intentionally, knowingly and in bad faith made false claims that Manildra infringed the patents, and that those statements induced [the LGWS purchasers] to limit their purchases from Manildra.

At oral argument, Manildra also emphasized Ogilvie's alleged representations to its customers that its patents dominated the field of LGWS and thus any use of LGWS from an entity other than Ogilvie or its licensees would infringe and would embroil the infringer in litigation. Manildra argues that the reaction of their customers in refusing to buy from Manildra "simply because of the legal situation" confirms Manildra's view of the case.

Contrary to Manildra's position, however, is our conviction that the record in this case does not contain evidence sufficient to establish the critical "wrongful" elements. Moreover, the record fails to establish both the composition of the "litany" and how the "litany" renders Ogilvie liable under the state laws and the Lanham Act. In support of its argument, Manildra lists exhibit after exhibit which purportedly corroborate its position. Yet after examining the entire record on appeal, we have discovered only one document, referred to as P715, out of several thousand trial exhibits, that provides some evidence that Ogilvie without qualification stated that Manildra was infringing its patents. Moreover, this single document is not a direct communication between Ogilvie and one

> of its customers, but rather is an internal customer memorandum between two of the customer's employees regarding future LGWS purchases and a future expansion of business, in which context the memorandum summarizes Ogilvie's statements. The other exhibits simply do not support the proposition for which they are cited. Furthermore, out of over fifteen thousand pages of transcript, no testimony directly bears on Ogilvie's falsity/misconduct.
>
> This court has also discovered no evidence, and was not directed to any by the parties, that supports Manildra's "domination" argument. As conceded by Manildra, we cannot consider Henkel's conduct and statements in this regard. In fact, once the evidence of Henkel's conduct is excised from this appeal, Manildra's whole case on the Lanham Act and state law tort claims disintegrates.

Man. App. at 16a-19a (footnotes omitted).

Manildra's improper reliance on Henkel evidence has continued with its Petition for Certiorari. The discussion below demonstrates that each evidentiary point discussed in the Petition either relates to conduct which could only reasonably be inferred to have been committed by Henkel, not OMI, or relates to subjects other than infringement.

C. Manildra Relies on Henkel Evidence to Support a Verdict Against OMI.

Out of 15,000 pages of transcript, 1,000 trial exhibits, and over 50 witnesses' testimony, Manildra has offered just five individual pieces of circumstantial evidence to

support its claims. These five, according to Manildra, are the "substantial evidence" which empowered the jury to award $4.75 million in damages against OMI, after the same jury had exonerated OMI of patent misuse, inequitable conduct, and antitrust violations. When this circumstantial evidence is reviewed carefully, as the Federal Circuit reviewed it, its lack of substance becomes apparent.

1. Trial Exhibit 715 Contains Only an Uncorroborated Second-Hand Report.

The first of the five items is a memorandum from one employee of Moore Business Forms ("Moore") to another. In that memorandum, the following appears: "Ogilvie has stated that their company holds all patent rights on use of starch on carbonless paper and Manildra infringes on this patent." Man. App. at 94a.

The Federal Circuit did not ignore this exhibit. Instead, the Federal Circuit discussed this exhibit at length in the portion of its opinion quoted above. Man. App. at 17a-18a. The Federal Circuit referred to this document as "at most a 'mere scintilla' ", a showing which could not possibly support Manildra's Lanham Act and tort claims. *Id.* at 19a.

This exhibit is no more than that, just a scintilla. It is not enough to allow a reasonable jury to infer that OMI had accused Manildra of infringement, either as to all of Manildra's customers or indeed even as to this customer. The reasons are several. For example, the exhibit does not name an individual and implies only that someone from OMI had at some time in the past made the accusation.

Further, the exhibit is a business record as to its nonparty author and recipient, but it is a second-hand report as to the alleged OMI statement, admissible only because it is a party's alleged statement. Fed. R. Evid. at 801(d)(2), 805. Manildra offered no live or deposition testimony from the memorandum's author or recipient or from any other person claiming to have actually heard any OMI employee make such an accusation. Man. App. at 18a. The Court has held that "mere uncorroborated hearsay or rumor does not constitute substantial evidence." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 231 (1938).

Additionally, this memorandum involves at most only Moore, a single Manildra customer, and so cannot support the jury's damage award based on lost sales to all of Manildra's potential customers. In any event, Moore's agent testified that Moore chose not to increase its purchases from Manildra because of Manildra's thinly capitalized financial condition, which left Moore uncertain of Manildra's reliability, not because of any patent issue. OMI App. at 1a-3a. Thus, this note was not evidence that OMI had caused Manildra any loss.

The Federal Circuit was correct in holding that this scintilla of evidence could not reasonably support the jury's verdict of liability on the "unfair competition" claims.

2. Robert Dunn's Testimony is Henkel Evidence.

Manildra's second item is the testimony of Robert Dunn, who was employed by Henkel when it owned the Patents and became an employee of OMI when OMI

purchased the Patents. Manildra quotes a passage from Mr. Dunn's testimony in which he is asked whether he ever accused Manildra of infringement and he responds "I may have". Man. App. at 86a.

Manildra claims the jury could reasonably infer from that equivocal statement that Dunn made the accusation, and made it while he was employed by OMI. But Manildra failed to provide the Court the context for this testimony. The preceding pages of Dunn's testimony demonstrate that these questions were part of a series of inquiries about his activities at *either* Henkel *or* OMI. The exchange began on pages 8039-40 of the transcript (OMI App. at 4a-5a), where Dunn testified:

> Q. My question is real simple. Did you or did you not ever tell a customer that either Henkel or Ogilvie had the patents on the large granule wheat starch?
>
> A. We did. We informed them that we acquired them from Staley.

In that context, Manildra asks the Court, as it asked the jury, the district court, and the Federal Circuit, to make a double assumption. The first assumption is that Dunn's testimony related solely to his employment with OMI (despite the absence of any other corroborating evidence that he ever accused Manildra of infringement while employed by OMI), rather than to his employment by Henkel (a period in which a significant body of evidence showed that he and others made such accusations). The second assumption is that when Dunn said "I may have," he meant instead "I did."

The Federal Circuit correctly held that the proposed double-assumption connection between Dunn's testimony and Manildra's suggested conclusion is not a reasonable inference and is instead an unwarranted attempt to rebuild Manildra's case through hindsight reconstruction.

3. The Keller Testimony Is Also Henkel Evidence.

Manildra next presents testimony about two conversations between salesman Peter Calott, who came from Henkel to OMI, and Michael Keller of Moore. The first of these conversations occurred in October 1984, when Calott was employed by Henkel and, therefore, was not and could not be evidence of OMI's conduct. The second occurred after Calott had become an OMI employee. Manildra attempts unsuccessfully to import a statement from the first conversation into the second.

During the first conversation, in October 1984, Keller testified that Calott told him that "he was aware that Moore used Manildra, but it would not pay for Henkel to take the case to court because the costs that would be incurred through litigation would be – it would be far more expensive than the results." Man. App. at 61a.

Keller was then questioned about the second conversation, while Calott was employed by OMI. Keller's recollection of this second conversation was exhausted with no mention of Calott accusing Manildra of infringement. Man. App. at 63a. Then, in response to specific "refreshment" questions, Keller twice denied that the subject of

an infringement lawsuit was raised in the second conversation:

> Q. Did Mr. Calott mention Manildra in that meeting?
>
> A. Yes he did.
>
> Q. What did he say about Manildra in that meeting?
>
> A. Manildra does not have patent rights.
>
> Q. Did he say anything else about Manildra?
>
> A. No.
>
> Q. Did he mention the possibility of a lawsuit involving Manildra?
>
> A. No.

Man. App. at 63a.

Then, immediately after that testimony, Keller was asked this question and gave this answer:

> Q. Did he refer to his prior discussion about it wouldn't be cost-effective to sue Manildra for patent infringement?
>
> A. I think he had mentioned it at that meeting.

Man. App. at 63a.

Construing Keller's testimony about the second conversation to include a discussion of the cost-effectiveness of a lawsuit by OMI would require reading that testimony as self-contradictory. If the subject of patent infringement and litigation did not come up, then Calott could not have mentioned the cost-effectiveness of OMI filing a

suit. Instead, the plain reading is that if a lawsuit was ever discussed by Calott, it concerned an action by Henkel, not OMI. As to OMI, Keller testified that Calott never mentioned suing Manildra.

The Federal Circuit properly held that this highly ambiguous reference could not support a reasonable inference that OMI had directly accused Manildra of infringement.

4. The Price Competition Testimony Does Not Relate to Infringement.

The fourth and fifth items Manildra presents are statements by OMI's salesmen that OMI will not reduce its price to match Manildra's lower price. These statements are unrelated in any way to infringement.

Manildra first cites testimony about a Calott call report in which he informs his supervisor that Moore told him Manildra had recently lowered its price for large-granule wheat starch. Calott reported that he had responded that Manildra is not a "legitimate competitive situation" and that OMI would not match the lower price. Tr. Ex. 697, Man. App. at 89a. In testifying about this report, Calott explained that he meant Manildra's price drop was not a "genuine price competitive situation," and that OMI intended to remain a "price leader" and distinguish itself through its service and quality rather than price. Man. App. at 59a.

The second reference is another call report, in which Calott advises that the same customer, Moore, had reminded him of Manildra's lower price. The call report

notes that his response "again went through our litany on our position in the LGS field and why we have to be a leader." Tr. Ex. 713, Man. App. at 91a. Calott testified, in a passage quoted by Manildra (Man. Pet. at 18), that his "litany" on why Manildra must be a leader included an explanation that in order to recover the money paid for the Patents, OMI would need to maintain a higher price for its LGWS.

Both of these conversations, then, were about price competition, not patent infringement. Nothing in these conversations would support even an inference that OMI had accused Manildra of infringement.

If the best support for the jury's verdict lies in these five bits of evidence, then the jury's verdict was clearly not based on reasonable inferences about OMI's conduct. The Federal Circuit correctly held that the verdicts on the Lanham Act and tort claims could not stand.

D. The Federal Circuit Shows Proper Deference to Jury Verdicts.

Manildra's Petition is filled with references from secondary sources accusing the Federal Circuit of ignoring fact-finders or usurping the fact-finder's role. These sources all relate, as Manildra admits, to the Federal Circuit's review of bench trials under the "clearly erroneous" standard of Fed. R. Civ. P. 52(a), not to its review of rulings on motions for JNOV and JMOL in jury cases under the "stricter" substantial evidence test of Fed. R. Civ. P. 50. Man. Pet. at 8 n.5. These sources also relate to the Federal Circuit's perceived tendency to employ these methods to *uphold* patents or find them infringed. See,

e.g., Desmond, "Nothing Seems Obvious to the Court of Appeals for the Federal Circuit," 26 Loy. L.A.L. Rev. 455, 478 (1993) ("The CAFC seems prepared to validate any patent on the issue of obviousness at the expense of overturning Supreme Court precedent").

Whether or not that tendency exists, it is completely unrelated to the Federal Circuit's decision in this case. Here, the Federal Circuit *affirmed* a *jury verdict* holding two patents were *invalid* and *not infringed*. The jury's verdict was overturned only on the Lanham Act and state law claims, because on those claims no reasonable inferences could be drawn in Manildra's favor from the record.

While the Federal Circuit has its critics regarding its review of bench trials, it has received much more favorable commentary on its review of jury verdicts:

> The Federal Circuit has been very active in developing a coherent set of rules and guidelines governing jury practice in patent infringement cases. It has been particularly faithful in observing the more demanding standard of review that applies to jury verdicts: findings of fact by the jury are more difficult to set aside, being reviewed only for reasonableness under the substantial evidence test, while those of a district judge are reviewed under the clearly erroneous rule. It considers itself bound to determine whether a jury verdict can be sustained, on any reasonable theory. It is also perfectly willing to permit an adequately instructed jury to deal with legal questions.

Harmon, "Seven New Rules of Thumb: How the Federal Circuit Has Changed the Way Patent Lawyers Advise

Clients," 14 Geo. Mason U.L. Rev. 573, 582 (1992) (footnotes omitted).

The list of cases in Manildra's Table I, Man. App. at 109a-115a, also fails, on close examination, to square with Manildra's portrayal of the Federal Circuit as a renegade fact-finder. One of the sixteen cases listed as "overturning" jury verdicts is this one, *Manildra Milling Corp. v. Ogilvie Mills, Inc., et al.* Of the remaining fifteen, two do not even involve a situation like the one presented here. In *Sun Studs, Inc. v. ATA Equipment Leasing, Inc.*, 872 F.2d 978 (Fed. Cir. 1989), the Federal Circuit *reinstated* a jury verdict by reversing the trial court's JNOV. The Federal Circuit repeated several times throughout the opinion that the JNOV must be overturned because a reasonable jury could have found as that jury did. *Id.* at 984, 986-88, 994. The court vacated only a single jury determination, that the plaintiff's damages were partially barred by laches, because no evidence of prejudicial reliance was presented. In every other respect, the jury's verdict was upheld. In *Malta v. Schulmerich Carillons, Inc.*, 952 F.2d 1320 (Fed. Cir. 1991), *cert. denied*, 119 L.Ed.2d 566 (1992), the district court entered a JNOV, and the Federal Circuit simply affirmed that order as being appropriate due to the lack of evidence to support plaintiff's claim of equivalent infringement.

That leaves thirteen cases on Manildra's list. Of these, six reversed a judgment or portion of judgment based on an issue of law unrelated to the sufficiency of evidence before the jury. *Oiness v. Walgreen Co.*, 26 U.S.P.Q.2d 1548 (Fed. Cir. Oct. 8, 1992), *cert. denied*, 123 L.Ed.2d 473 (1993) (upheld verdicts of validity and infringement, reversed damage verdict due to incorrect

jury instructions); *Lemelson v. General Mills, Inc.*, 968 F.2d 1202 (Fed. Cir. 1992), *cert. denied*, 122 L.Ed.2d 131 (1993) (reversed verdict of infringement because inherently inconsistent with unchallenged verdict of nonanticipation); *Wilson Sporting Goods Co. v. David Geoffrey & Associates*, 904 F.2d 677 (Fed. Cir.), *cert. denied*, 498 U.S. 992 (1990) (reversed verdict of infringement because proposed hypothetical claim under doctrine of equivalents was legally invalid since it read on prior art); *Senmed, Inc. v. Richard-Allan Medical Industries, Inc.*, 888 F.2d 815 (Fed. Cir. 1989) (same as *Wilson*); *Lear Siegler, Inc. v. Sealy Mattress Co.*, 873 F.2d 1422 (Fed. Cir. 1989) (same as *Wilson*); *Sjolund v. Musland*, 847 F.2d 1573 (Fed. Cir. 1988) (reversed magistrate's finding of obviousness because it is question of law).

Only the remaining seven cases actually reversed some portion of a jury's verdict based on the sufficiency of the evidence. Of those, five reversed only a small portion of the verdict and upheld the remainder. *Collins Licensing, L.P. v. AT&T Co.*, 28 U.S.P.Q.2d 1847 (Fed. Cir. 1993) (upheld verdicts of validity of seven of eight patent claims and noninfringement of all claims, reversed only verdict of validity of eighth claim); *Mendenhall v. Cedarapids, Inc.*, 5 F.3d 1557 (Fed. Cir. 1993) (upheld verdicts of invalidity of twelve of thirteen claims of plaintiff's patent, reversing only verdict of validity of thirteenth claim; upheld verdict of infringement of twenty claims of defendant's two patents); *Braun, Inc. v. Dynamics Corp. of America*, 975 F.2d 815 (Fed. Cir. 1992) (affirmed verdicts of patent validity and infringement, reversed verdicts on Lanham Act, trade dress infringement, and passing off); *Read Corp. v. Portec, Inc.*, 970 F.2d 816 (Fed. Cir. 1992)

(affirmed verdicts of validity and infringement of utility patent, reversed verdict of infringement of design patent); *Tol-O-Matic, Inc. v. Proma Produkt-Und Marketing Gesellschaft m.b.H.*, 945 F.2d 1546 (Fed. Cir. 1991) (affirmed all verdicts of noninfringement, reversed verdict of invalidity based on inutility because not disputed).

As a result, only two decisions by the Federal Circuit on Manildra's list of 38 cases reversed a substantial portion of a jury's verdict based on the insufficiency of the evidence. In both of those, the Court denied petitions for writ of certiorari. *Ernster v. Ralston Purina Co.*, 27 U.S.P.Q.2d 1692 (Fed. Cir. 1992), *cert. denied*, 123 L.Ed.2d 472 (1993); *Dana Corp. v. IPC Ltd. Partnership*, 860 F.2d 415 (Fed. Cir. 1988), *cert. denied*, 490 U.S. 1067 (1989). It appears that Manildra's accusations of rampant fact-finding by the Federal Circuit in jury cases are based on illusion, not reality.

E. OMI Has Continuously Challenged Manildra's Claims for Lack of Evidentiary Basis.

Manildra claims that OMI admitted in its motions during or after trial that evidence existed to support Manildra's claims. OMI did not. Instead, OMI's position was consistent at all times: no substantial relevant evidence supports Manildra's Lanham Act and tort claims.

During the argument on OMI's motion for directed verdict at the close of the plaintiff's case, on a page of transcript immediately following the excerpt in Manildra's Appendix, OMI's counsel stated:

> And in any event, the record does not support the Third Amended Complaint's allegations that Ogilvie employed threats or coercion, other than to state its rights. The customer's buyers testified that although Ogilvie's salesmen often mentioned the patents validity, they never made a threat to any one.

OMI App. at 6a.

In the brief supporting its post-trial motion for JMOL, OMI stated (immediately preceding the sentence quoted by Manildra in Man. Pet. at 21):

> In sum, there is a total lack of evidence to establish that any of the Ogilvie salesmen knew or believed that the Patents were invalid, or knew or believed that the Patents were not infringed by Manildra, but, with actual malice, stated to the contrary.

Man. App. at 102a.

Finally, in its appellate brief, OMI also returned to this argument, once again immediately preceding the portion Manildra quoted in Man. Pet. at 21, as follows:

> Virtually the entire case was tried on Manildra's claims of inequitable conduct, violation of the federal antitrust law, and patent misuse. The jury found in favor of Ogilvie on all of these issues. There was no testimony at the trial regarding the Lanham Act or the torts of injurious falsehood or interference with a prospective economic interest. The Court should not have instructed the jury on these claims. Ogilvie should have been granted judgment as a matter of law.

Man. App. at 104a.

These references demonstrate that OMI never abandoned its argument that there was no substantial evidence to support Manildra's Lanham Act and tort claims.

III. THE FEDERAL CIRCUIT COULD HAVE REQUIRED AN EVEN HIGHER STANDARD OF PROOF.

The Federal Circuit based its review of the evidence on the basic "substantial evidence" test and found Manildra's evidence on the Lanham Act and tort claims fell short of that standard. However, the Federal Circuit could have, and if necessary should have, required Manildra to demonstrate that its evidence on those claims was sufficient for a reasonable jury to find it clear and convincing. Manildra plainly did not meet this higher standard.[3]

The clear and convincing evidence standard should have been applied to Manildra's Lanham Act and state tort law claims in order to prevent the enforcement of those laws from unduly interfering with the enforcement of United States patents. Congress has declared that patents shall be presumed valid, 35 U.S.C. § 282, and to enforce that presumption the courts require a party challenging validity to prove its grounds by clear and convincing evidence. *Tol-O-Matic, Inc. v. Proma Produkt-Und Marketing Gesellschaft m.b.H.*, 945 F.2d 1546, 1552-54 (Fed.

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[3] A brief in opposition to a petition for writ of certiorari may raise any grounds which support the judgment below. Sup. Ct. R. 15.1. OMI raised this issue below, but the Federal Circuit declined to address the issue because its holding made consideration of this question unnecessary. Man. App. at 19a-20a.

Cir. 1991). Similarly, if a challenger claims a patent is unenforceable due to patent misuse, the patentee's enforcement efforts are presumed to have been made in good faith, and the presumption can be overcome only by clear and convincing evidence of bad faith. *Loctite Corp. v. Ultraseal Ltd.*, 781 F.2d 861 (Fed. Cir. 1985).

Since a patent grants an exclusive right to make, sell, and use an invention, enforcement of the patent may potentially conflict with the enforcement of federal antitrust laws, which prohibit anticompetitive conduct and monopolization. To accommodate the interests of these potentially conflicting statutes, the courts require a higher standard of proof where the alleged anticompetitive action includes patent enforcement. The antitrust claimant is required to prove that one of three specific types of conduct exists, by the same clear and convincing evidence standard applicable to a challenger of patent validity or enforceability. *Handgards, Inc. v. Ethicon, Inc.*, 601 F.2d 986, 996 (9th Cir. 1979), *cert. denied*, 444 U.S. 1025 (1980).

The present case demonstrates the potential for conflicts between vigorous patent enforcement and two additional areas of law, the Lanham Act and state "unfair competition" laws. To avoid chilling the free exercise of the exclusivity rights inherent in a presumptively valid patent, these two bodies of law should be restricted in the same way that the antitrust laws have been restricted. A patentee should face no liability under the Lanham Act or state tort law for enforcing its patent, including accusing others of infringement, unless there is clear and convincing evidence that its enforcement conduct actually occurred and was undertaken in bad faith.

This restriction on the Lanham Act and state laws should require that these laws may apply only if the challenged conduct constitutes patent misuse or inequitable conduct as defined by the patent laws. Only that formula will ensure that these laws do not prohibit activity which the patent laws protect. Using that formula, Manildra's Lanham Act and state-law claims would be barred as a matter of law in any event, because the jury specifically found, whenever asked, that OMI was not guilty of patent misuse or inequitable conduct. Man. App. at 4a. Manildra waived any objection it may have had to these jury findings by failing to challenge them through a motion for JMOL, either before or after the verdict, and by failing to raise the issue on appeal. Fed. R. Civ. P. 50; Man. App. at 4a-5a.

The Federal Circuit has noted that some cases have held that a patentee's statements in enforcing a presumptively valid patent cannot be the basis of a Lanham Act claim at all. Man. App. at 19a; *Tubeco, Inc. v. Crippen Pipe Fabrication Corp.*, 402 F.Supp. 838, 847 (E.D.N.Y. 1975), *aff'd*, 538 F.2d 314 (2d Cir. 1976) (table); *Lang v. Pacific Marine & Supply Co.*, 703 F. Supp. 1404, 1411 (D. Haw. 1989), *aff'd*, 895 F.2d 761 (Fed. Cir. 1990). Other cases have held to the contrary. *Brandt Consolidated, Inc. v. Agrimar Corp.*, 801 F.Supp. 164, 174 (C.D. Ill. 1992); *Chromium Industries, Inc. v. Mirror Polishing & Plating Co.*, 448 F. Supp. 544, 555 (N.D. Ill. 1978). Rather than use an all-or-nothing approach, the *Handgards* accommodation, which imposes liability only where there is clear and convincing evidence of patent misuse or inequitable conduct, appears to be the most appropriate method of resolving

the potential conflict between these two bodies of federal law.

Kansas tort law, of course, does not stand on an equal footing with federal patent law and must give way under the Supremacy Clause whenever its enforcement would interfere with the exercise of federally protected rights. U.S. CONST. art. VI, cl. 2; *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 152 (1989) (state law cannot prohibit activity that federal patent law protects); *Virginia State Board of Pharmacy v. Virginia Citizens Consumers Council, Inc.*, 425 U.S. 748, 765 (1976) (commercial information flow is protected from state interference by First Amendment). Here, also, application of the clear-and-convincing standard of evidence would prevent the state laws from unduly hampering patentees' good faith efforts to enforce their federally granted rights of exclusivity.

When the claimant's burden of proof is by clear and convincing evidence, the court's analysis of the sufficiency of the evidence on a JMOL motion incorporates that burden. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Plainly, if the Federal Circuit had required Manildra to show that a reasonable jury could find that the evidence clearly and convincingly demonstrated that OMI had with knowing falsity accused Manildra of infringement, Manildra's references to ambiguous pieces of the record could not have withstood that test. For this additional reason, the Federal Circuit's result on the Lanham Act and tort claims was correct, and certiorari by the Court is unnecessary.

CONCLUSION

No genuine constitutional issue is presented by Manildra's Petition. The Federal Circuit reached the correct result in this case, based on a thorough review of the record. Manildra's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

BYRON L. GREGORY
McDERMOTT, WILL & EMERY
227 West Monroe Street
Chicago, Illinois 60606
(312) 372-2000

Of Counsel:

ROGER W. WENTHE
MARK LEE HOGGE
PATRICK McANANY

APPENDIX

[Keller Tr. 3701]

A. Yes.

MR. WALCH: Page 26, Line 13.

Q. How long has Moore been utilizing Manildra in the Fremont plant?

A. It's for the last five years that I know.

Q. So it was being used before you came into Moore?

A. I would estimate, yes, guesstimate.

Q. Was there ever a time when Manildra's starch was used 100 percent at the Fremont plant?

A. Yes.

Q. When was that?

A. In 1985.

Q. When did that change?

A. In 1986, Fremont had a new coater, what we call our super coater, where additional volume was being produced at that plant.

Q. At the time of this additional volume is when Manildra was reduced from 100 percent at that time?

A. Correct.

Q. Why was Manildra reduced from 100 percent at that time?

A. We wanted a surety of supply.

Q. Who made that decision to reduce Manildra?

A. I did, in conjunction and discussion with Mr.

[Keller Tr. 3702]

Zgonce.

Q. What was the additional volume added to the Fremont plant in 1986? Was it doubling? Was there an increase of so many pounds or tons or however it's measured or what?

A. In essence, it doubled.

Q. Did you make any – did you attempt to determine if Manildra could handle the additional capacity at Fremont?

A. No. No one had called me.

Q. Excuse me?

A. No one had called me from Manildra.

Q. I'm not sure I understand. What does that have to do with whether you attempted to determine whether Manildra could handle the extra capacity?

A. It was felt that it would be better to have Ogilvie as a backup supplier at that time.

Q. When you say it was felt, was that you are feeling?

A. Yes, in conjunction with Mr. Zgonce.

Q. And why did you feel that it was better to have Ogilvie as a back up supplier at that time?

A. The unsurety of Manildra to supply the

[Keller Tr. 3703]

material. There were rumors that Manildra was in financial problems and would not be able to supply all our needs.

Q. Other than these rumors, did you have any information that led you to –

A. No.

Q. – question Manildra's ability to supply your needs?

A. No.

MR. WALCH: Then to Page 29, Line 7.

Q. In 1986, when you cut back Manildra from 100 percent supplier to the Fremont plant, did you can you tell them back in volume or just in percentage?

A. Just in percentage.

Q. So Manildra's volume remained the same?

A. Yes.

Q. It's just because of the doubling of the plant capacity that their percentage was different, is that right?

A. Right.

Q. So basically, you gave all the new capacity to Ogilvie and continued Manildra at the prior level?

A. Correct.

[Dunn Tr. 8039]

A. That I know.

Q. All right. We won't worry about Midwest for the moment. You also have no reason to believe there was anything wrong with Manildra's quality?

A. It – it was used by at least two customers, so it must be satisfactory to them.

Q. All right. And during this period of time, either you or your sales staff have advised your customers that you have patents?

A. Well, they – we didn't have to advise them of that. They knew all about these patents long before we acquired them.

Q. But you've also told them or advised them on occasion that there are patents out there?

A. They would raise questions about them, yes.

Q. In response – regardless of who raised the question, you've told them that there are patents?

A. Yeah, they knew there were patents.

Q. They knew it, but you never told them that. Is that what you're testifying to?

A. I didn't have to. Staley had the patents before us. They knew all about the patents.

Q. My question is real simple, did you or did you

[Dunn Tr. 8040]

not ever tell a customer that either Henkel or Ogilvie held the patents on the large granule wheat starch?

A. We did. We informed them that we acquired them from Staley.

Q. Nothing to do with why you did it, I'm sure from your perspective your motives were sound. Just the fact is you did it. You or your sales staff also –

MR. GREGORY: Is that a question, Your Honor?

THE COURT: Ask your question, Mr. Walch. Go ahead and ask your question.

Q. You or your sales staff also have from time to time either in response to a question or on your own initiative told them that – told certain customers that you thought Manildra was infringing those patents?

A. If they asked the question and would bring up the subject of Manildra, we would try and answer those questions as honestly as we knew how.

Q. All right. And on those occasions, you did tell them that Manildra – you thought Manildra was infringing the patent?

[Gregory (Mot. for Dir. Verdict) Tr. 7270]

them aware of what may be down the road."

First this is not actionable behavior. A patent holder has the right to express its position on its patent unless there is no good faith belief in the validity or the enforceability of the patents, and we've cited the Bechik case and *Walker Process*. And in any event, the record does not support the third amended complaints allegations that Ogilvie employed threats or coercion, other than to state its rights.

The customers, buyers testified that although Ogilvie's salesmen often mentioned the patents validity, they never made a threat to anyone. John Curtis, a Mead buyer, said he never personally received any threat from Ogilvie and he knows no one else at Mead who received a threat. That's trial record 3676 and 77. Ted Crow of Moore – a buyer with Moore, said he could not think of any threats by either Henkel or Ogilvie, trial record 3829.

And finally, none of Manildra's employees who testified knew first hand of any threats by Ogilvie, and they did not know of anyone at

[Instruction No. 24a]

Evidence of conduct of the Henkel Corporation has been admitted into this case. This evidence has been admitted for the limited purpose of determining whether or not Manildra has proved one or more of the three conditions described in Instruction 24. You may not consider this evidence for any other purpose.